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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1236

THOMAS ZAMMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1976. A petition for rehearing was denied on February 26, 1976 (Pet. Supp. App. 3sa-4sa). The petition for a writ of certiorari was filed on March 1, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether the court properly instructed the jury regarding the elements of an offense under 15 U.S.C. 77q (b).

3. Whether certain comments by the trial judge deprived petitioner of a fair trial.

STATUTE INVOLVED

15 U.S.C. 77q(b) provides:

> It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of six counts of causing the use of the mails in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1341 and 2, and of six counts of causing the use of the mails to publish an article describing a security without fully disclosing a bribe paid for the article, in violation of 15 U.S.C. 77q(b) and 18 U.S.C. 2.[1] He was sentenced to concurrent terms of 18 months' imprisonment on each count.

The evidence showed that in 1972 petitioner, a private securities dealer, was promoting a public sale of the common stock of Power Conversion, Inc. (A. 102a-103a, 214a, 218a, 475a-476a, 687a-690a, 842a-848a).[2] Through

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[1]William Aiken pleaded guilty to one count of the indictment. William Rodman was acquitted on all counts.

[2]"A." refers to petitioner's appendix in the court of appeals.

an acquaintance, Stanley Perlmutter, petitioner asked William Aiken, executive editor of *Value Line Selection and Opinion* ("*Value Line*"), an investment advisory service, to publish an article in *Value Line* about Power Conversion in return for a payment from petitioner (A. 91a, 94a).[3] Aiken initially balked at doing business with petitioner, because petitioner had not paid Aiken the full agreed amount for an earlier article concerning Casa Bella Imports, Inc. (A. 97a, 199a, 211a-212a). When, however, Perlmutter assured Aiken that this time there would be guaranteed payment (A. 278a), Aiken agreed to meet with petitioner (A. 99a, 211a). Aiken eventually agreed to publish the article in return for $15,000 in cash and an option to purchase 20,000 shares of Power Conversion stock. Petitioner promised Aiken $1,000 cash in advance and 1,000 shares of stock to be held as security for payment of the remainder (A. 99a, 212a-217a).

Following the meeting at which this agreement was reached, petitioner and Aiken went to petitioner's apartment. There they met Henry Goldfarb, another broker whose firm was trading Power Conversion stock (A. 218a). Petitioner soon left the room and called Aiken into the kitchen, where, out of Goldfarb's presence, he gave Aiken $1,000 and three stock certificates representing 900 shares of Power Conversion stock (A. 218a-219a).

Some time later Aiken informed petitioner that the article was ready for publication, and they agreed to meet at a New York restaurant (A. 222a). Before the meeting Aiken told his fiancee that they were meeting petitioner to give him copies of the article and to receive the agreed payment (A. 456a-457a). In the men's room

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[3]As executive editor, Aiken had virtually absolute control over the contents of the service, subject occasionally to Arnold Bernhard's desire to have a particular item published (A. 294a-297a).

of the restaurant petitioner gave Aiken $14,000 in cash and offered him an additional bribe of $25,000 to "park" 25,000 shares of Power Conversion stock (A. 224a-225a).[4] Aiken gave petitioner an envelope containing six copies of the issue of *Value Line* carrying the Power Conversion article.[5] The article contained no disclosure of the payment petitioner made to Aiken.

The prosecution introduced evidence that Aiken previously had published an article concerning Casa Bella Imports, Inc., in return for a promise of payment by petitioner. That article, too, had been published without disclosure of the promise (A. 97a, 199a, 211a-212a; Gov't Exh. 1A).

Petitioner called as a witness the Comptroller of Arnold Bernhard & Co., the corporate publisher of *Value Line*. On cross-examination he testified that the company represented itself to the public as a reliable investment advisory service, giving independent, objective evaluations of securities and that if Aiken had disclosed to the company that he had received a payment from petitioner, the article would never have been published, or, had it already been published, the company would have disclosed the facts to its subscribers (A. 1020a-1024a).

ARGUMENT

1. Petitioner contends (Pet. 27-33) that the prosecution's proof was deficient because it did not establish that he

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[4]"Parking" stock, as defined by Aiken at trial, means getting a friendly portfolio or money manager to agree to buy stock, sometimes for a monetary consideration and sometimes with a guarantee against loss. It is a method of getting stock off the market (A. 224a-225a). "Parking" is a manipulative device in violation of 15 U.S.C. 78j(b).

[5]42,955 copies of this issue of *Value Line* were mailed to subscribers (Gov't Exh. 1E).

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intended the payment to Aiken to go undisclosed to *Value Line*'s subscribers. But although there was no proof that petitioner specifically instructed Aiken not to disclose the payment, the conclusion that petitioner desired nondisclosure was virtually inescapable. The entire transaction between petitioner and Aiken was conducted in a clandestine manner. The final cash payment of $14,000 took place, at petitioner's suggestion, in the men's room of a restaurant. Similarly, the earlier $1,000 cash advance had occurred at petitioner's apartment only after he summoned Aiken into the kitchen, out of the presence of another broker. Moreover, the very fact that the payments of large sums of money were made in cash was evidence that petitioner desired to keep knowledge of the transaction from the public record. Cf. *Spies* v. *United States*, 317 U.S. 492, 499. Too, this was not the first such transaction between petitioner and Aiken; the article concerning Casa Bella Imports, Inc., also had been published without disclosure of the payment. And, finally, the jury could conclude that the very success of petitioner's scheme depended on non-disclosure of the payment for the article. Had the payment been revealed, the success of the article as a means of persuading people to buy Power Conversion stock (and hence of raising its price) would have been fatally impaired.

Petitioner also contends (Pet. 31-33) that the government failed to prove that he caused the article to be "published." It is true that Aiken was not the corporate "publisher" of *Value Line*. But Aiken testified (A. 294a-297a) that he had all but total editorial control of the publication, subject only to his employer's occasional desire to have a particular item published. Petitioner knew that Aiken was in a position virtually to ensure publication of the article. The only reason petitioner made the payment to Aiken was to have the article published. Petitioner brought about the publication of the article. That is enough. See *Pereira* v. *United States*, 347 U.S. 1, 8-9; *Nye & Nissen*

v. *United States*, 336 U.S. 613; *United States* v. *Peoni*, 100 F.2d 401, 402 (C.A. 2).

2. Petitioner challenges three elements of the trial court's instructions regarding 15 U.S.C. 77q(b). Petitioner does not question the correctness of the court's instructions relating to the mail fraud counts. He received concurrent sentences on each of the counts of which he was convicted. Accordingly, the Court need not consider his contentions in regard to the instructions. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16. In any event, this is only the second case to consider the elements of the offense under Section 77q(b).[6] There is no conflict among the circuits and no reason to grant the writ.

a. The court instructed the jury that (A. 1239a):

> [I]t is necessary for you to find that the Government has proved beyond a reasonable doubt each of the following four elements of that crime: First, that a person by use of the mails has published or circulated an article describing a security.
>
> Second, that consideration for such publication or circulation has been received or promised from a dealer.
>
> Third, that there has been no disclosure of the payment made or promised or the amount of such consideration.
>
> Fourth, that the article has been wilfully and knowingly circulated.

As to the third element, the court went on to state (A. 1241a-1242a; emphasis added):

> If you find that money or other consideration has been promised or paid for an article which will be

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[6]The other case is *United States* v. *Amick*, 439 F.2d 351 (C.A. 7).

> circulated by mail, then you must determine whether the promise or amount of consideration has been made public or disclosed. *If you find that the money was transferred secretly, that will be sufficient to satisfy the third element.*

Petitioner contends (Pet. 22-23) that the underscored sentence had the effect of directing a verdict on the issue of his intent to seek publication of the article without his payment for its being disclosed. But this portion of the instruction did not relate to petitioner's intent or state of mind; it concerned only the issue of actual non-disclosure. The instruction informed the jury that if the transfer of the money was secret and remained so upon publication of the article, the element of non-disclosure would be satisfied. The court then turned to the fourth element of the offense and told the jury that it could convict petitioner only if it found that he acted "wilfully and knowingly," that is, deliberately and with a "bad purpose or motive" (A. 1232a, 1242a). Thus the issue whether petitioner had made the payment to Aiken with the specific purpose of avoiding its disclosure was placed squarely before the jury.

b. Petitioner argues (Pet. 24-26) that he was entitled to an instruction "that a publisher is one who issues or causes to be issued printed matter for sale or circulation." This instruction was necessary, he contends, because of his defense that "Aiken was not a publisher" and that he "could not possibly have caused the article to be published" since the final decision regarding publication lay with Aiken's employer. But 15 U.S.C. 77q(b) does not incorporate petitioner's mechanical notions of "ultimate" or "legal" power to determine what is published. The actual ability to publish or cause publication of an article is enough, for actual publication produces the deception of the public that the statute is designed to avert. Aiken's

authority as executive editor gave him virtually a free hand in determining what to publish in *Value Line;* that he may not have been the "publisher" of *Value Line* was immaterial, and the instruction requested by petitioner could only have misled the jury.

c. Petitioner's final claim regarding the instructions—that the court failed to require the jury to find that he intended non-disclosure of payment (Pet. 26-27)—already has been answered at pages 4-5, *supra.*

3. Petitioner contends that he was deprived of a fair trial because of two allegedly prejudicial comments by the trial judge. Both comments were, however, mandated under the circumstances.

a. During defense summation, counsel argued to the jury that "my client is on trial for making a payment which he had a perfect right to make under the Federal law provided said payment was disclosed" (A. 1140a-1141a). The government objected, and the court responded (A. 1141a):

> Yes, we went over that earlier [7] and it was determined that under State law if the jury finds it to be true, it is not a legal act. The question is whether or not you are implying to the jury that giving a payment under the circumstances here is legal.
>
> You said it was legal and we determined it was illegal under State law to give such a payment.

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[7]The court's reference is to the argument on petitioner's motion for judgment of acquittal. Petitioner had argued that payment to Aiken was a legal act, if disclosed. The government had rebutted that argument by pointing out that even if disclosed the payment might have violated the New York Commercial Bribery Statute, New York Penal Law § 180.00 (McKinney 1975). The court instructed defense counsel at that time that "it is incorrect to say to the jury something is legal which is made illegal by the state law, even though not made illegal by the federal statute" (A. 1060a).

> The Federal law makes it illegal to give such a payment if it is not disclosed. Don't mislead the jury by telling them it is a legal act if they find it did occur.

Petitioner argues (Pet. 19-20) that the court's reference to an act illegal under state law was inflammatory. But petitioner's antecedent remark clearly was capable of misleading the jury into believing that federal law affirmatively protected petitioner's conduct; in fact, if petitioner's conduct had not been made unlawful by federal law it still might have violated state law. No federal law gave petitioner a "perfect right" to make the payment despite any applicable state laws. Having opened up a subject that counsel had specifically been warned to avoid, petitioner cannot complain of the court's attempt to correct the mistaken impression the remark may have left with the jury.

b. During rebuttal the prosecutor referred to the prior undisclosed payment for the article relating to Casa Bella Imports. Defense counsel moved to strike the remark on the ground that there was no evidence that the payment in that case had not been disclosed (A. 1170a-1171a). The court commented (A. 1171a-1172a):

> I told the jury it is their recollection of the facts which control. The motion to strike is unnecessary.
>
> If they remember it differently, they remember it differently. I don't remember precisely what Mr. Aiken said, but it is the jury's recollection that controls and they might even infer that from all of his other testimony or the testimony relating to this, if they so desire. That was also an illegal proposition.
>
> There is evidence from which they could, if they believed the testimony of Aiken, infer that that was so in that case, so it is unnecessary to strike it.
>
> Proceed.

Petitioner contends that this comment conveyed to the jury the court's belief that "the law had been breached in the case at bar" and that from that fact it could "infer that Casa Bella was an illegal proposition" (Pet. 20-21).

The court's remark was proper. There was substantial evidence of record that the Casa Bella payment had not been disclosed.[8] The court did not say that it believed petitioner to have committed a criminal offense, either previously or in the instant transaction, but simply informed the jury that if it believed Aiken's testimony, it could find that the prior transaction was illegal. Furthermore, the court went on to charge the jury specifically that petitioner was not on trial for the Casa Bella transaction and that the evidence concerning the episode could be considered only "with respect to the question of whether [petitioner] acted knowingly and wilfully and intentionally" in the instant case (A. 1233a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1976.

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[8]This was in the form of a statement made by Aiken in connection with his plea agreement (Gov't Exh. 1A); the statement was admitted in evidence and read to the jury.

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